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July 1, 2002

The Honorable Jeffrey W. Runge, M.D.
Administrator
National Highway Traffic Safety Administration
400 Seventh Street, S.W.
Washington, D.C. 20590

Dear Dr. Runge:

RE: Confidential Business Information (67 Fed. Reg. 21198, April 30, 2002)
Docket No. NHTSA 2002-12150 – 10

The Alliance of Automobile Manufacturers (Alliance), whose members are BMW Group, DaimlerChrysler, Fiat, Ford Motor Company, General Motors, Isuzu, Mazda, Mitsubishi Motors, Nissan, Porsche, Toyota, and Volkswagen, submits the following comments in response to the above-referenced notice regarding the procedures and substantive standards for protecting confidential business information now contained in Part 512 of the agency's regulations.

The Alliance appreciates NHTSA's efforts to update Part 512 to clarify the rule and to reflect modern case law regarding the protection of business confidential information. NHTSA's ability to obtain information cooperatively from the private sector is directly related to the agency's ability to protect that information from public disclosure when the information is not customarily disclosed to the public by the submitting manufacturer, or when release of the information would harm the competitive position of the submitting manufacturer.

The Alliance comments are divided into two parts. The first addresses the statutory presumption that "early warning" information submitted to NHTSA in compliance with the Transportation Recall Enhancement, Accountability and Documentation ("TREAD") Act will not automatically be made public and sets forth the bases for the protection of the submissions. The second part of the comments addresses five issues that apply generally to the protection of confidential business information submitted to NHTSA: (1) the proposal to revise the submission protocols for confidential business information; (2) the proposed requirements that manufacturers take responsibility for redaction of personal information; (3) the extremely burdensome proposal to require submitters to amend at any future time "any information" submitted in support of a claim that information is entitled to confidential treatment; (4) the effect of the *Critical Mass* decision on the proposal to establish presumptions that public release of certain information would not cause competitive harm to manufacturers; and (5) the status of submitted information pending any appeal of the agency's determination about the confidentiality of the information.

I. The TREAD Act Presumes that "Early Warning" Submissions Will Be Confidential.

Section 3(b) of the TREAD Act requires NHTSA to issue regulations to obtain "early warning" information from vehicle and equipment manufacturers. Although these regulations have not yet been issued in final form, NHTSA requested commenters to address in comments to this docket whether the agency should presume the confidentiality of some or all of the "early warning" information that will be submitted by manufacturers.[1]

A. Congress Presumed that the "Early Warning" Submissions Will Be Confidential. NHTSA must protect the confidentiality of most of the information that will be submitted in compliance with the early warning rule. The TREAD Act itself presumes that the "early warning" information would be confidential, and directed that NHTSA not automatically release confidential "early warning" information unless the Administrator determines that the release of the information will assist the agency in carrying out § 30117(b) and §§ 30118 through 30121 of Title 49 of the United States Code. (49 U.S.C. § 30166(m)(4)(C), as added by the TREAD Act.) As these provisions relate to the investigation and remediation of specifically-identified safety-related defects and noncompliances, the Alliance believes that the intent of Congress was that (1) "early warning" submissions are generally presumed to be confidential; (2) "early warning" submissions are not to be released automatically to the public; and (3) "early warning" submissions would not automatically be accessible by the public, unless and until a specific defect (or noncompliance) investigation is opened, and the relevant portions of the "early warning" submissions are added to the docket of that particular investigation, if they are not otherwise protected from disclosure under Exemption 4 of the Freedom of Information Act.

This understanding of the meaning of § 30166(m)(4)(C) strikes an appropriate and reasonable balance between the public's interest in seeing information related to a potential specific defect or noncompliance (release of which is generally encouraged by § 30167 of the Vehicle Safety Act), and the manufacturers' interest in protecting against wholesale release of competitively relevant and sensitive information as well as of the unconfirmed reports that will comprise the "early warning" system (protection of which is assumed by § 30166(m)(4)(C)).

Moreover, this understanding of the meaning of § 30166(m)(4)(C) is supported by the text and structure of the statutory provision itself. Section 30166(m)(4)(C) of the Vehicle Safety Act, added by the TREAD Act, provides that none of the early warning information that will be collected under the new early warning program "shall be disclosed *pursuant to section 30167(b)* unless the Secretary determines the disclosure of such information will assist in carrying out sections 30177(b) and 30118 through 30121 of this title." (Emphasis added.) However, under longstanding NHTSA practice, *nonconfidential* information related to potential defects or

[1] In preparing these comments, the Alliance necessarily made assumptions about the probable requirements of the "early warning" rule. After the "early warning" rule is issued, the Alliance may supplement these comments, if it is necessary and appropriate to do so. The Alliance nevertheless believes that it had sufficient information from the "early warning" NPRM from which to make an effective assessment of the likely competitive harm that would flow from public disclosure of some of the information proposed to be collected.

noncompliances under investigation by the agency is routinely available in the agency's public reference reading room, without the need for a Secretarial "determination" under § 30167(b), even though NHTSA could lawfully invoke FOIA Exemption Seven (relating to law enforcement investigations) to protect this information. Thus, as a practical matter, information in NHTSA's possession *is not even considered for release* under § 30167(b) of the Safety Act, ***unless and until that information is already entitled to confidential treatment*** under one of the Freedom of Information Act exemptions.[2]

Thus, Congress must have ***presumed*** that the early warning submissions would qualify for confidential treatment under the Freedom of Information Act (most likely Exemption Four, although Exemption Seven is theoretically available as well). Otherwise, there would have been no reason for Congress to have added § 30166(m)(4)(C) to the Vehicle Safety Act, which is sensible under NHTSA's longstanding customs only if the "early warning" compilation is already entitled to confidential treatment under one of the Freedom of Information Act exemptions. The most natural reading of the reason for Congress' enactment of § 30166(m)(4)(C) is that it intended to neutralize the presumption in favor of disclosure contained in § 30167(b), with respect to the early warning submissions, and to subject them, instead, solely to the traditional considerations under FOIA of their confidentiality.[3]

This new section of the Vehicle Safety Act cannot reasonably be construed as superfluous, meaningless, or completely redundant of existing law. *See, e.g., TRW Inc. v. Andrews*, 122 S. Ct. 441, 449 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks and citation omitted); *Duncan v. Walker*, 121 S. Ct. 2120, 2125 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute. We are thus reluctan[t] to treat statutory terms as surplusage in any setting.") (internal quotation marks and citations omitted; alterations in original); *United States v. Alaska*, 521 U.S. 1, 59 (1997) ("The Court will avoid an interpretation of a statute that renders some words altogether redundant.") (internal quotation marks and citation omitted); *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997) ("Our reading of the [statutory] exemption is therefore also consonant with the doctrine that legislative enactments should not be construed to render their provisions mere surplusage."); *American Nat'l Red Cross v. S.G.*, 505 U.S. 247, 263 (1992) (rejecting argument that violated the "canon of statutory construction requiring a change in language to be read, if possible, to have some effect"); *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) ("The cardinal principle of statutory construction is to save and not to destroy. It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section, as the Government's interpretation requires.") (internal quotation marks and citations omitted).

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[2] A memorandum in the "early warning" docket prepared by the Chief Counsel contemporaneously with the enactment of TREAD takes the same position. See NHTSA Docket 01-8677, Entry 5 at page 2.

[3] An alternative reading of Congressional intent is to conclude that Congress intended to create a categorical, statutory exemption from disclosure of any of the early warning information, precluding disclosure under FOIA Exemption 3. In a letter to Transportation Secretary Slater dated October 19, 2000, the President of Public Citizen stated her belief that the TREAD Act provided for mandatory withholding of the early warning information under FOIA Exemption 3.

To be faithful to these principles of statutory construction that dictate the need to find a meaning for each statutory provision that is added by Congress to an existing law, the Alliance submits that the agency must adopt an interpretation of the new § 30166(m)(4)(C) that gives meaning to the Congressional determination that "early warning" submissions would, in fact, be treated as confidential business information. Otherwise, there was no reason for Congress to have referred to existing § 30167(b), which is irrelevant under NHTSA's practices unless the data at issue is already presumptively "confidential."

This reading of the meaning of § 30166(m)(4)(C) is also strongly supported by the agency's existing practices with respect to pre-investigatory, or screening, information about motor vehicles or motor vehicle equipment at the time of enactment of TREAD, which added § 30166(m)(4)(C) to the Vehicle Safety Act. In October 2000, when TREAD was passed by Congress, the agency had a practice of conducting a variety of pre-investigatory screening of information, some of which is supplied by the manufacturer upon request from the Office of Defects Investigation. That practice continues to this day. NHTSA did not then, and does not now, automatically release publicly the fact of such screens, nor is there any automatic release of the information obtained during the screening from a manufacturer. Rather, the first agency-initiated release of information about a possible safety defect is the monthly publication of the fact that a new Preliminary Evaluation has been opened with respect to a specific product, at which time a public file is established and relevant information is released about that product (such as consumer complaint information available to NHTSA).

Congress is "presumed to be aware of established practices and authoritative interpretations of the coordinate branches." *U.S. v. Wilson*, 2002 U.S. App. LEXIS 8907 at *22 (D.C. Cir. 2002), quoting *National Lead Co. v. United States*, 252 U.S. 140, 147 (1920) and *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). When an agency has an established practice, and Congress legislates in an area related to that established practice, "Congress is presumed to preserve, not abrogate, the background understandings against which it legislates." *U.S. v. Wilson*, 2002 U.S. App. LEXIS 8907 at *21, citing to *Bennett v. Spear*, 520 U.S. 154, 163 (1997) and *Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983).

Congress is therefore presumed to have been aware of NHTSA's longstanding practices of routinely releasing information during the pendency of a specific defect/noncompliance investigation, but routinely refraining from the automatic release of pre-investigatory screening information about particular vehicles or items of motor vehicle equipment. Since the only provision of TREAD that addresses the disclosure of "early warning" information is § 30166(m)(4)(C) (which as discussed above, is relevant ***only if*** the information is already confidential), then § 30166(m)(4)(C) must be construed as an effort "to preserve, not abrogate" those existing practices. *U.S. v. Wilson*, 2002 U.S. App. LEXIS 8907 at *21.

Finally, this interpretation of the statute is consistent with the Administration's policy on the Freedom of Information Act, as announced by Attorney General Ashcroft on October 12, 2001. In that statement of Administration policy, the Attorney General stated that the Administration is committed to ensuring a well-informed citizenry through compliance with the FOIA, but is equally committed to "other fundamental values that are held by our society," including the value of "protecting sensitive business information." The policy statement

encourages agencies to give "full and deliberate consideration of the institutional, commercial and personal privacy interests that could be implicated by disclosure of the information" when deciding whether to protect or release information.

The Alliance thus agrees with proposed § 512.23(a)(3), and disagrees with proposed Appendix B subsection (b), to the extent that Appendix B subsection (b) was intended to refer to some categories of "early warning" submissions outside the context of a specific defect or noncompliance investigation.

B. The "Early Warning" Submissions Are Competitively Sensitive, and Release of Them Will Cause Competitive Harm to the Submitting Manufacturers. Because the "early warning" submissions will be mandatory, the proper standard for judging the presumptive confidentiality of the information contained in the submissions is whether "disclosure of the information is likely either (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Ass'n. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Regarding the "competitive harm" prong, the law does not require that submitters prove that release will cause actual competitive harm. Rather, the law requires evidence of "actual competition and a likelihood of substantial competitive injury" from the release of the information. *CNA Fin. Corp. v. Donovan,* 830 F.2d 1132, 1152 (D.C. Cir. 1987). *See also Frazee v. U.S. Forest Serv.*, 97 F.3d 367, 371 (9th Cir. 1996); GC *Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1113 (9th Cir. 1994); and *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983).

1. There is "actual competition" over quality and customer satisfaction in the market for new vehicle sales. There should be no doubt that there is "actual competition" in the auto industry. Auto manufacturers compete with one another vigorously for new vehicle sales. Quality and customer satisfaction are two elements on which vehicle manufacturers compete vigorously and for which vehicle manufacturers expend substantial amounts of research money annually. Customer satisfaction and quality ratings are often used in advertising new vehicles in the belief that customers use these ratings in their purchasing decisions. This is one of the central aspects of competition among auto manufacturers today, as discussed in a report from AutoPacific, Inc., an independent company that specializes in market research and new product development in the automotive industry, which was commissioned by the Alliance and which is attached as Attachment A. AutoPacific found in the statement attached to these comments that, "It is well known that auto manufacturers and component manufacturers closely guard their warranty data for competitive product design and pricing reasons." AutoPacific goes on to observe that, "...it is certain that anticipated relative vehicle quality, reliability and durability are very important to many new vehicle buyers when selecting their new vehicle." A representative sample of recent advertisements for new motor vehicles touting the comparative quality of the advertised products demonstrates the existence of "actual competition" for new vehicle sales based on perceived quality of the products is appended as Attachment B.

AutoPacific's conclusions are strongly supported by recent research conducted by Maritz Marketing Research into the top considerations that affect a consumer's choice of a new motor vehicle. Maritz Marketing Research is America's largest custom market research firm

specializing in survey research. Maritz claims to have more experience in automotive customer satisfaction research than any firm in the world. Maritz' Automotive Research Group currently conducts manufacturers' customer satisfaction programs that cover nearly two-thirds of the new cars and light trucks sold in the United States. Maritz concluded that the factors, in descending order, are:

1. Reliability (Dependable)
2. Well Made Vehicle
3. Good Engine/Transmission
4. Durability (Long Lasting)
5. Value for the Money
6. Safety Features
7. Lease Terms
8. Price/Deal Offered
9. Riding Comfort
10. Ease of Handling
11. Monthly Payment
12. Manufacturers Reputation
13. Warranty Coverage
14. Dealer Service
15. Interior Roominess
16. Power and Pickup
17. Exterior Styling
18. Quietness
19. Cost of Service/Repairs
20. Gas Mileage
21. Future Residual Value
22. Resale Value
23. Interior Styling
24. Passenger Seating
25. Cargo Space

Source: 2001 New Vehicle Customer Survey, MARITZ Marketing Research.

The competitive factors that could be influenced by public release of the "early warning" data include, at a minimum, the top four factors. This research strongly supports the point that the "early warning" information has competitive sensitivity and that its release would be competitively harmful to the submitting manufacturers.

Finally, the competitive sensitivity of this type of information is underscored by the industry's responses to the annual "initial quality" survey conducted by J.D. Power & Associates, a well-known surveyor of automobile quality issues. Auto manufacturers vie for good scores on that survey, because it is perceived as important information for consumers in their new car purchasing decisions. *See "What's in a Car-Quality Score? – J.D. Power Report Isn't a Full Performance Guide for Consumers,"* Wall Street Journal, May 30, 2002, page D6.

2. The information in the "early warning" submissions is confidential precisely because of its comprehensive nature and is always treated as confidential by the vehicle manufacturers. There can also be no doubt that the comprehensive collection of information that will be contained in the "early warning" submissions is ordinarily treated as confidential by the submitting manufacturers. The Alliance knows of no public source for this comprehensive information. In fact, when Alliance members submit a less expansive subset of their warranty data to the California Air Resources Board (CARB), it is done with the expectation that the submissions are confidential.

Here, in fact, the competitive value of this information consists in its comprehensive and continuing content, which permits the sort of model-to-model comparison that would be competitively harmful to the submitter of any information pertaining to a model that has, for example, a warranty claim experience on a particular component that is higher than average. Thus, the fact that NHTSA generally discloses *limited*, model- and model-year-specific information about consumer complaint, warranty and property damage claims, and field reports when such information relates to specific defect investigations does not justify the release of the comprehensive compilations of information that will be collected pursuant to the "early warning" requirements, because those limited releases do not permit wholesale, industry-wide comparisons of the quality or durability of all significant components on models chosen for comparison.

The unfairness of subjecting the submitting manufacturers to the competitive harm that would flow from disclosure of this sort of information is exacerbated by the fact that the model-to-model comparisons that will undoubtedly be made, should this compendium be released to the public, will not in fact be an "apples-to-apples" comparison of the performance of that model to other models, for reasons that the Alliance has explained in detail in prior comments to the early warning docket. For example, different manufacturers have different warranty periods. A manufacturer with a longer warranty period can be expected to have more warranty claims (on a population-normalized basis) than a manufacturer with a shorter warranty period. Valid comparisons cannot be made about the relative warranty experience of models built by these two manufacturers; yet, it is foreseeable that such comparisons would be made if the compendium of "early warning" information is released. This potential unfairness of facilitating invalid and misleading comparisons of performance indicators is yet another reason to protect the compendium of "early warning" information from automatic public disclosure. *Worthington Compressors v. Costle*, 662 F.2d 45, 52, n.43 (D.C. Cir. 1981) ("If the [trial] court finds the tests cannot be accurately duplicated, it should consider whether competitors or consumers may ***misuse*** the information to the detriment of appellants' competitive positions.") (emphasis added).

Despite the fact that the "early warning" submissions will not permit scientifically valid comparisons among the products made by different manufacturers, the "early warning" submissions will nevertheless provide an extremely valuable window into the perceived quality of vehicle models and the customer satisfaction of vehicle owners on a make/model/model-year basis. The fact that these submissions are comprehensive of all makes/models and continuous over a multi-year timeframe makes them a valuable compendium of quality and customer satisfaction information that could not be replicated easily at any price and that can be used by competitors to follow warranty trends in their competitors' vehicles, thus providing one window

into those competitors' costs. This is a relevant inquiry, as the D.C. Circuit noted more than two decades ago:

> "Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government." *Worthington Compressors v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981).

Because the information in this compendium can be used to harm the competitive position of any one submitting manufacturer, the compendium of quality and customer satisfaction information is presumptively entitled to protection from public disclosure under Exemption 4 of the Freedom of Information Act, even though the individual components of the "early warning" reports would, in isolation, likely be released by NHTSA in the context of a specific defect investigation. *Trans-Pacific Policing Agreement v. U.S. Customs Serv.*, 1998 U.S. Dist. LEXIS 7800 at **10-11, (D.D.C. 1998) (information that is publicly released by the government in other contexts is nevertheless protected in the larger context of a more comprehensive collection of information that could be "linked" to the otherwise publicly available information to cause competitive harm). On appeal, the D.C. Circuit agreed that "by linking" information sought in FOIA request with other available information, "serious competitive harm" likely would result, but remanded the case to the District Court to determine whether that harm could be avoided by selective redaction of some of the information. *See Trans-Pacific Policing Agreement v. United States Customs Serv.*, 177 F.3d 1022, 1026 (D.C. Cir. 1999) *See also Timken Co. v. United States Customs Serv.*, 491 F.Supp. 557, 559 (D.D.C. 1980).

Thus, NHTSA's long-standing practice of releasing information limited in terms of scope and timeframe related to consumer complaints, warranty claims, property damage claims, field reports, etc., when this information has been submitted in connection with an individual, specific defect investigation does not defeat the presumptive confidentiality of the comprehensive collection of such information. A limited release of information that is relevant to, and specific to, an individual defect investigation is much different from a competitive standpoint than the automatic release of the continually collected, full compendium of quality and customer satisfaction information that is represented by the complete "early warning" submission each quarter. The "early warning" submissions regarding the counts of warranty claims, consumer complaints, property damage claims, and field reports should thus be protected by a class determination presuming their confidentiality and, as discussed in more detail in Section I.B.4, below, should not have to be accompanied by a traditional Part 512 justification with each quarterly submission.

3. Warranty claims information is particularly sensitive from a competitive standpoint. A particularly compelling case can be made for the presumptive protection of one proposed category of "early warning" submissions: the warranty claims information.

With respect to the compendium of warranty claims that will be submitted each quarter by each vehicle manufacturer, the Alliance members and their franchised dealers would be placed at a particular competitive disadvantage, should that information be released routinely to their direct competitors, aftermarket parts manufacturers, potential new entrants into the vehicle manufacturing market, and the public at large, as discussed in the attached report from AutoPacific, Inc.

a. Aftermarket parts manufacturers. Alliance members compete with independent aftermarket parts manufacturers for the sale of certain replacement or repair components. Those independent parts manufacturers would gain a significant competitive advantage from having routine access to the warranty claims experience of vehicle components on a make/model/model year basis. For example, a manufacturer of aftermarket brake components would gain, at no cost, access to the competitively valuable information about the trends in warranty experiences on brake systems of various make/model vehicles. The competitive value of this information to aftermarket parts manufacturers is illustrated by two publications prepared annually by MEMA/OESA for their members. The first publication, Automotive Industry Status Report 2001 (November 2001) provides

> "an overview of the current situation in the global automotive industry, enumerating expectations and trends within the automotive sector. Detailed analysis illustrated with numerous charts and graphs. Primarily covers aftermarket parts and services for light vehicles. Includes forecasts where possible and *historical data to provide context for the outlook.*" (Emphasis added.) (MEMA/OESA publication MKR102).

MEMA/OESA sells this publication to non-members for $495.

Another publication, "Replacement Rates of U.S. Automotive Parts (2001), is also prepared annually by MEMA/OESA for its members, and sold to non-members for $50. This publication is described as

> "a pocket guide to 58 service jobs – from air conditioning repairs to wiper blade replacement. The handy card shows the percentage of private vehicles receiving specified maintenance. As many as six years of historical trends are shown in the table, *when the data are available.*" (Emphasis added.) (MEMA/OESA publication MKR105).

The presumed demand for this information, which led the aftermarket parts manufacturers' trade associations to collect and publish these data, powerfully illustrates the potential value of this information, and the associated competitive harm from releasing the comprehensive collection of warranty claims experience. This is supported by the AutoPacific statement attached to these comments. Even if there is no safety-related concern with respect to those warranty claims, the aftermarket parts manufacturers will know where to target their marketing efforts when those affected vehicles come off warranty, at the direct expense of the

vehicle manufacturers' competitive positions, as well as their dealers. Moreover, the vehicle manufacturers required to submit this compendium each quarter would have no parallel access to information about the complaints about performance of the aftermarket suppliers' components.

To put the size of this sector into context, the Automotive Aftermarket Industry Association (AAIA) estimates that the automotive aftermarket sector employs 3.7 million people, compared with 1.34 million people employed by the vehicle manufacturers. Aftermarket (light duty vehicle) sales are estimated to be $185.5 billion in 2002 (of which tires account for about $20.5 billion).

b. Potential New Entrants. The manufacturers who will be required to submit "early warning" reports also face potential competition from new entrants to the U.S. motor vehicle manufacturing market. In recent years, the U.S. motor vehicle market has seen the entry of several Asian companies, including Kia Motors, Daewoo, Daihatsu and Hyundai, and there has been public speculation about the possibility of European companies entering (or re-entering) the U.S. market, including Renault. Release of the "early warning" reports would provide these potential competitors with access to an otherwise unavailable collection of comprehensive data about manufacturers' warranty experiences on various components. This data would permit a new entrant to estimate the probable ranges of warranty claims rates (and by inference, the associated costs), without having to expend resources to try to obtain this information privately, such as by paying for market research, or to take the market risk of entering the market without the benefit of this information. As AutoPacific notes in the attached statement, "Providing that field experience to other manufacturers effectively gives them a 'free ride' at the expense of the first manufacturer." This is a classic example of competitive harm that would flow from automatic public release of this comprehensive collection of warranty claims experience. *Worthington Compressors v. Costle*, 662 F.2d at 51-52 (D.C. Cir. 1981).

c. Franchised Dealers. Finally, the manufacturers' franchised dealers, many of which are small businesses, will also be harmed competitively by the automatic release of the quarterly compendium of "early warning" data, especially warranty claims data. If one manufacturer loses a new vehicle sale to another manufacturer because of competition over quality issues, the franchised dealer of the first manufacturer also loses the sale, and suffers the same competitive harm. Although FOIA Exemption Four is ordinarily understood to protect the *submitter* from competitive harm, in this context it is important to recognize the role of the franchised dealers as the manufacturers' partners in the creation of the warranty claims database, and thus, indirectly, as submitters of the information. This potential adverse effect on these small businesses provides another policy reason in favor of establishing a class determination to protect "early warning" submissions from automatic public disclosure.

4. Practical Consideration. Another practical consideration argues in favor of establishing a class determination in favor of the presumptive confidentiality of the counts of "early warning" information that will be submitted under the new rule. The agency's "early warning" proposal is to obtain most of the "early warning" information electronically, in a spreadsheet format. The Alliance supports that proposal. It would be extremely unwieldy and inefficient to require a separate, hard-copy submission of each of these spreadsheets to the Office of Chief Counsel, containing a confidentiality justification each quarter. In fact, such a

requirement would defeat the entire purpose of obtaining "paperless," electronic submissions of these large data files. It would be far more efficient to consider the issue now and to establish appropriate class determinations presuming the confidentiality of these electronic submissions.

Moreover, for the same reason, the final rule should provide that the "early warning" submissions are exempt from the regulatory requirement to submit confidential information along with a full Part 512 justification, including a declaration from a company official. Ordinarily, a submitter of information subject to a class determination (such as a blueprint or technical drawing) still submits a Part 512 justification letter pointing out that the information is subject to a class determination. For the practical reason that requiring such quarterly submissions in hard copy would defeat the resource-saving reasons for proposing to collect most of the information electronically, NHTSA should also waive the requirement that these electronic submissions be submitted again in hard copy to the Office of Chief Counsel for confidentiality review.

II. Issues Relating Generally to the Protection of Confidential Business Information

A. Submission Protocols for Confidential Business Information. The NPRM proposes to revise the submission protocols for confidential business information. One proposal is that the Office of Chief Counsel should receive a copy of the submission "containing only the information claimed to be confidential, and any non-confidential information necessary to enable the agency to assess the submitter's claim for confidential treatment." This proposal would, in effect, require submitters to prepare ***three*** versions of each submission to the agency: a complete version for the office primarily interested in the submission; a "public" version for docketing; and a version containing only the "confidential" information for the Office of Chief Counsel. This extra burden is not justified. The current system of supplying a complete copy to the Office of Chief Counsel, along with a "public" version for docketing has worked well. The NPRM provided no reason to revise that protocol. Under current practice, which is codified in the existing regulation, submitters are expected to identify for the Office of Chief Counsel the information for which confidential treatment is sought. Under this practice, OCC already obtains the information it needs to evaluate the claims for confidential treatment. There is no good reason to change this aspect of the status quo.

The Alliance is also concerned with another aspect of the proposal, under which submitters are supposed to anticipate which non-confidential information might be necessary "to enable the agency to assess the submitter's claim for confidential treatment." It is unreasonable to place submitters in the position of guessing which non-confidential information might be "necessary" to allow the agency to assess a submitter's claim. By retaining the existing requirement for submission of the entire document (public and confidential), the Office of Chief Counsel itself can determine which aspects of the submission might be "necessary" to allow it to determine the confidentiality of those portions of the submission that are claimed to be confidential.

B. Redaction of Personal Information. In the proposal, NHTSA "requests" that personal information (including names, addresses, phone numbers) be redacted by the submitting manufacturer. The Alliance respectfully submits that redaction of personal information is the

government's responsibility, not that of the submitting manufacturers. In fact, the Alliance believes that NHTSA cannot discharge its obligation under the federal Privacy Act to assure the protection of personal identifying information by deferring to a redaction conducted by private submitters. Thus, NHTSA would not save any resources, since it would have to doublecheck all of the private submissions anyway and, therefore, cannot justify imposing any expectation of redaction on the private submitters. Moreover, manufacturers would bear the increased costs of submitting twice the number of copies – one redacted of personal information and one unredacted of personal information.

C. Proposal to Require Submitters to Amend Prior Submissions. NHTSA has proposed a major change in the confidentiality rules, proposing to require all submitters of information to amend their justifications and/or certifications in the event that there is any change even after the passage of many years in the status of information submitted in support of a claim for confidential treatment. This is a ***major*** departure from the current rule, which requires amendment only when failure to do so would constitute a "knowing concealment" of material information. The "knowing concealment" standard is reasonable and manageable. Under this standard, if a manufacturer obtains knowledge that a prior submission in support of a claim of confidentiality is no longer true and that failure to disclose that information to NHTSA constitutes a "knowing concealment" of information material to the continued protection of that information from public disclosure, the manufacturer must come forward to NHTSA and disclose the new information. The Alliance has no problem with this requirement of existing law.

By contrast, the proposal would eliminate the "knowing concealment" standard from the current rule and would, in effect, impose a new, very burdensome requirement on submitting manufacturers to maintain a constant monitoring program to determine whether any information claimed to be confidential might, somehow, have been published, released, or otherwise disclosed. This constant vigilance requirement goes far beyond anything required by the FOIA, and greatly increases the burdens imposed by Part 512 of NHTSA's rules.

D. Effect of the *Critical Mass* Decision on the Proposed Presumption that Public Release of Certain Types of Information Would Not Cause Competitive Harm. NHTSA has proposed to establish several categories of information the release of which would be presumed not to cause competitive harm. For reasons outlined in Part I, above, the Alliance opposes any such presumptions for the categories of "early warning" submissions, suggesting instead that Congress intended any routine public release of any of those data to occur only after the establishment of a specific defect or noncompliance investigation docket, where the value of the total "compendium" of information is not implicated because only the relevant portions of the early warning submissions would be docketed in those files.

With respect to the proposed categories in general, the Alliance questions how NHTSA proposes to apply these presumptions in the event that the information is submitted voluntarily, such as in response to a rulemaking proposal, or in response to information about pending research initiatives. Under these circumstances, there should be ***no presumption*** that any information should be released for reasons related to competitive harm, because the *Critical Mass* decision affords categorical protection to information that is submitted voluntarily, as long as the information is not "customarily" released to the public, without regard to any assessment

of competitive harm associated with release of the information. *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992).

As to the specific proposed categories, the Alliance is particularly concerned with the proposal to consider compliance test reports to be presumptively public information. The Alliance notes that NHTSA has typically released compliance test protocols and associated results when the test protocol has been the same as the published NHTSA test protocol. The Alliance does not seek any change in this traditional approach. On the other hand, NHTSA has traditionally protected *both test protocols and results* when the test protocol was developed by the submitting manufacturer and constitutes its intellectual property. Under these circumstances, manufacturers have argued, and NHTSA has agreed, that these proprietary test protocols and the results of tests conducted according to these proprietary protocols reveal competitively sensitive information that should not be released to competitors under FOIA. In addition, NHTSA should protect all test results, regardless of test procedure used, conducted on those vehicles not yet in production.

On a related point, NHTSA has also traditionally protected test protocols that expand upon NHTSA test protocols, such as manufacturer-specific commitments to particular lighting or filming technology, or additional protocols related to foreign safety standards that permit a manufacturer to avoid the costs of additional compliance testing, on the basis that release of these extra protocols would reveal to competitors the costs incurred by a manufacturer in the conduct of certification or compliance tests. This distinction is not recognized in the proposed "class determination" of presumptively public information.

Finally, if NHTSA retains any segment of the proposal to establish class standards for presumptively public information, it should clarify that test results from tests conducted in accordance with NHTSA's test protocols, but at a higher speed or under different test conditions, are presumptively ***not public information***, because conducting such tests is entirely voluntary in the first place. The failure to protect these test results could encourage manufacturers to decline to conduct such tests or to decline to make investments in developing experimental test configurations, which would significantly impair NHTSA's ability to gain access to such information in the future. This sort of potential impairment is cognizable as a "third prong" of FOIA Exemption Four, and has been acknowledged by the courts as an independent reason for granting confidential treatment to privately submitted information, even if that information does not appear to have competitive significance. *See National Parks*, 498 F. 2d at 770. *Also see 9 to 5 Org. for Women Office Workers v. Board of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 9-10 (1st Cir., 1983) ("If it can be demonstrated with particularity that a specific private or governmental interest will be harmed by the disclosure of commercial or financial information the Government should not be precluded from invoking the protection of Exemption 4 merely because the asserted interest is not precisely one of those two identified in *National Parks*.").

E. Status of Submissions Pending Appeal of Confidentiality Determinations. The Alliance suggests that the final rule should explicitly state that information which a submitter claims to be confidential will remain confidential pending any administrative or judicial appeal of the agency's determination that the information is not entitled to confidential treatment. This is the agency's standard practice, and it makes sense. If the agency were to

release the information while its confidentiality is being contested, it would make the appeal process meaningless. Because public release of the information would moot the appeal, it is important to preserve the confidential status of the documents pending any appeal of a conclusion that they may not be entitled to confidential status. The final rule should so provide.

* * * * *

The Alliance appreciates this opportunity to comment on the significant issues associated with protecting confidential business information.

Sincerely yours,
Alliance of Automobile Manufacturers, Inc.

Robert S. Strassburger
Vice President
Vehicle Safety and Harmonization

cc: Jacqueline S. Glassman, Esq.
Chief Counsel

Docket Management, Room PL-401

Desk Officer for NHTSA, U.S. Office of Management and Budget
Office of Information and Regulatory Affairs

Attachment A

COMPETITIVE HARM ANALYSIS

Background

AutoPacific Inc. was asked by the Alliance of Automobile Manufacturers to consider the competitive consequences to vehicle and component manufacturers if the government were to make available to the public the comprehensive report on warranty claims experience and production volume information at the make/model/model year/component or system level that manufacturers will have to submit each calendar quarter under forthcoming new regulations expected to be promulgated by NHTSA.

Comments

AutoPacific's comments, which are not based on specific proprietary research, but based on many decades of experience working in the motor vehicle industry and in performing vehicle market research, are:

- It is well known that auto manufacturers and component manufacturers closely guard their warranty data for competitive product design and pricing reasons. Public availability of this data, used correctly or incorrectly, could seriously affect, either positively or negatively, the market for specific vehicles, and for both OEM and aftermarket components.

- Actual working experience at various automotive companies confirms that comparative component warranty experience, reliability experience, and durability experience strongly influences component pricing and sourcing decisions. Relatively favorable reported comparative data could be expected to positively affect sourcing decisions and pricing negotiations, while relatively unfavorable reported data could result in loss of business or reduced component pricing, for example. In addition, if one original equipment manufacturer purchases a component and obtains field experience with that component, it can be expected to use that information to make decisions about future purchases and the price it will pay. Providing that field experience to other manufacturers effectively gives them a "free ride" at the expense of the first manufacturer.

- The availability of vehicle manufacturers' experience with warranty claims at the component level could be of significant value to component manufacturers as they prepare their bids for new business, plan their new business marketing strategies, and estimate the likely costs and pricing positions of the vehicle manufacturers, with whom the component manufacturers may compete for aftermarket parts sales. Knowing the vehicle manufacturers' warranty claims experience at the component level could be very useful in helping to identify component markets worth targeting, to the competitive detriment of the vehicle manufacturers.

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insight@autopacific.com

- Consumer magazines (such as *Consumer Reports*), which report vehicle owner's reliability experiences, are very important to new vehicle buyers. In AutoPacific's *2002 Research Suite,* 22% of new vehicle buyers said that Consumer Magazines were consulted when deciding which new vehicle to acquire. This compares with 14% for TV Ads, 9% for Newspaper Ads, 5% for Magazine Ads, and 2% for Radio Ads.

- Based on existing consumer focus group input, consumer clinic data and consumer survey data, it is certain that anticipated relative vehicle quality, reliability and durability are very important to many new vehicle buyers when selecting their new vehicle. Publicly available warranty data could be expected to be used in accessing alternative vehicles, and that data might or might not be used appropriately.

Appendix

1. AutoPacific

AutoPacific, Inc. is an automotive specialist market research and product-consulting firm headquartered in Tustin, California with a satellite office in Southfield, Michigan. The Tustin facility specializes in primary research and consulting operations, while the Detroit-area office is responsible for market and industry analysis including sales forecasting and competitive product analysis.

AutoPacific was formed in 1986 to serve clients in the automotive industry. It does not research other industries or fields. Instead, its operation is unique in providing innovative, methodologically sound, strongly implemented research in addition to expert automotive analysis. AutoPacific is comprised of car people who have an interest in, and have been trained to do, quality marketing research as opposed to research people working in the automotive business.

During the past sixteen years, AutoPacific has conducted over 200 automotive product clinics and numerous other proprietary studies with domestic, European and Asian clients. About one quarter of these have included dynamic (ride and drive) evaluations as part of the process. In addition to product research, AutoPacific has conducted over 2,000 focus groups, mail surveys and telephone surveys for clients on numerous automotive issues.

Each year, AutoPacific publishes results of its annual *Research Suite* syndicated new car buyer and future vehicle survey. The most recent 2002 survey includes results from over 34,000 new car and light truck acquirers in the United States. Unique among syndicated surveys, AutoPacific's *Suite* analyzes future intentions as well as present vehicle satisfaction.

In 1999, AutoPacific moved into a new Automotive Futures Center (AFC) in Tustin, California. Tustin is adjacent to Newport Beach and Irvine, and is 30 minutes south of Los Angeles. The 10,500 square foot AFC facility is dedicated to automotive consumer research. AFC is unique in that it integrally houses a large focus group room with client viewing area and an adjacent high security vehicle viewing area with turntable. Outside the viewing area/showroom is a secured, lighted exterior courtyard.

AutoPacific's methodology design and research implementation is designed to provide clients with high quality, innovative, and cost effective product research.

2. AutoPacific Senior Professional Staff

George C. Peterson – President, AutoPacific: Mr. Peterson began his career in the automotive industry in 1966 as a Product Design Engineer in the Light Truck Advanced Engineering activities of Ford Motor Company's Truck Operations. In 1977, Mr. Peterson joined the Ford's Car Product Planning and served in various management positions product planning and marketing. In1982, Mr. Peterson joined Nissan as Corporate Manager for truck product planning.

Prior to establishing AutoPacific, Mr. Peterson was Vice President of Automotive Programs for J. D. Power and Associates. Mr. Peterson was responsible for developing the Power Forecast and directed Power's product- and manufacturer-specific activities.

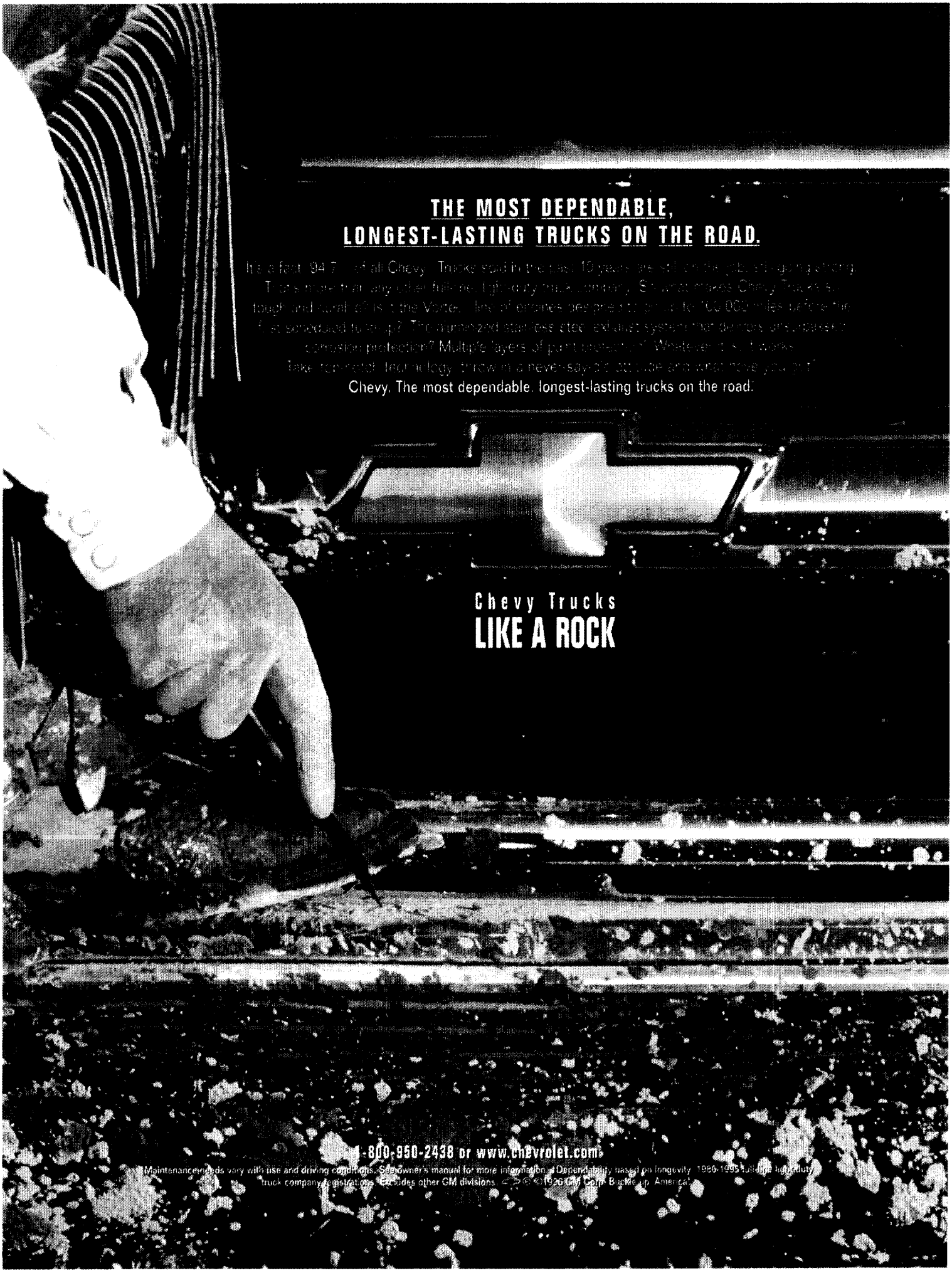
Mr. Peterson has a BS in Engineering from Florida State University, and an MBA from University of Michigan. He served in the United States Army Artillery in Viet Nam.

Rexford T. C. Parker – Vice President, Senior Consultant, AutoPacific: Mr. Parker joined AutoPacific in 2000 and is responsible for a variety of syndicated and proprietary design-related projects. Prior to AutoPacific, Mr. Parker was the top product planner for Hyundai Motor America, and in the process was the American most responsible for design, development and launch of the successful Santa Fe SUV. At Mazda prior to Hyundai, Mr. Parker was sedan product planning manager in charge of the Protegé, 626, Millenia and 929 car lines. He also guided Mazda's overall U.S. lineup planning. At Nissan through the late-80's, Mr. Parker was a U.S. program manager for sedans and sports/sporty cars, including the 1989-95 300ZX. Mr. Parker has an MBA from the UCLA Graduate School of Management and a BA from Brown University.

James M. Hossack – Vice President, Senior Consultant, AutoPacific: Mr. Hossack has 30 years of experience in the automotive industry. Mr. Hossack has an undergraduate degree in Mechanical Engineering from the Massachusetts Institute of Technology, an MBA from the Harvard Business School and attended the Executive Program at Dartmouth. He worked in Product Planning at Ford Motor Company from 1970 to 1982, and in Product Planning/Marketing at Chrysler Corporation from 1983 to 1991. Since that time he has served at the Vice President level at both Mazda and Hyundai, with responsibility for Product Planning, Pricing and Market research. Mr. Hossack joined AutoPacific in 1998.

JMH 6/26/02

Attachment B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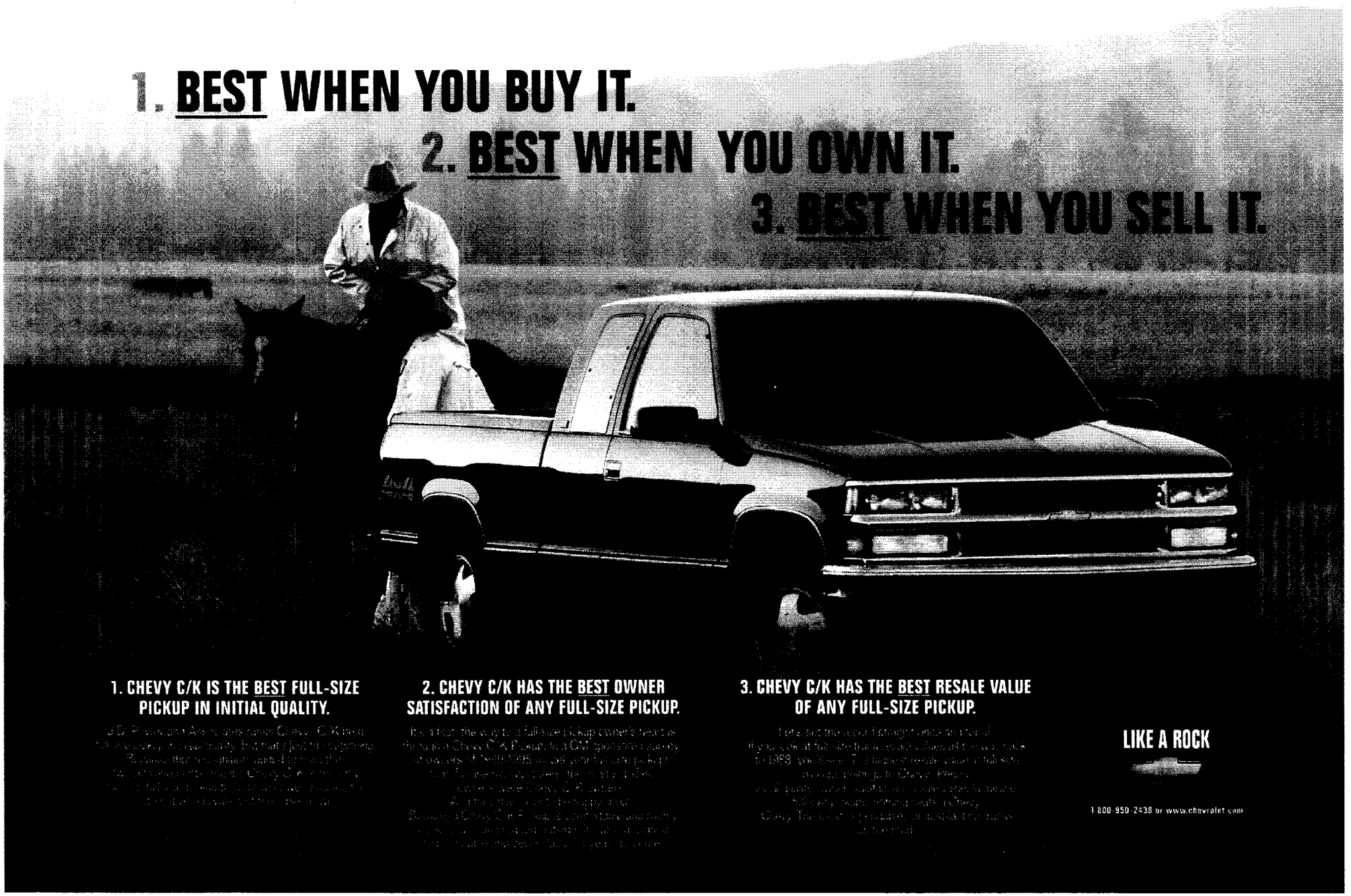
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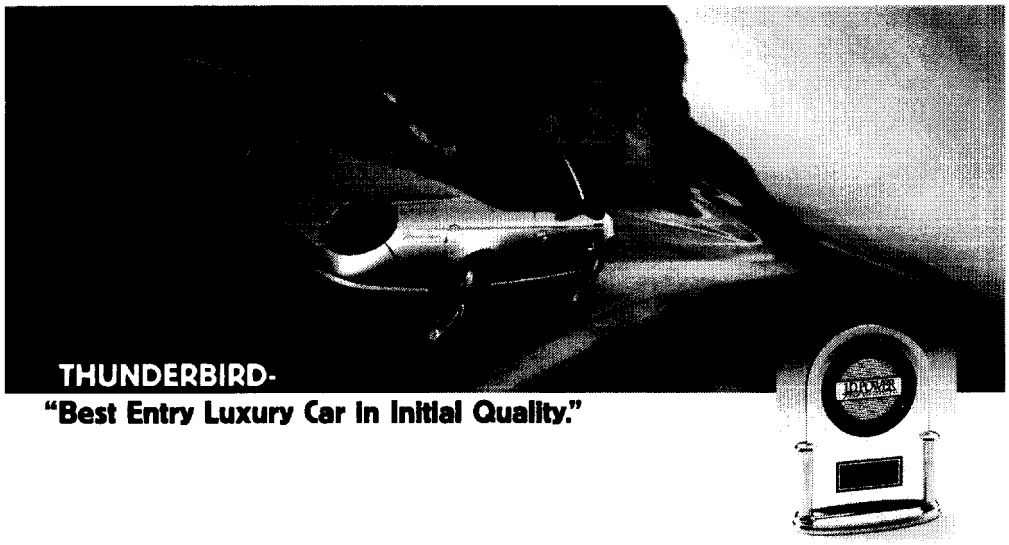

"Best Entry Luxury Car in Initial Quality."

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J.D. Power and Associates 2002 Initial Quality Study®. The Ford Expedition was the highest ranked Full-Size Sport Utility Vehicle two years in a row and the Ford Thunderbird was the highest ranked Entry Luxury Car in the J.D. Power and Associates 2002 Initial Quality Study®. Study based on a total of 64,905 consumer responses, indicating owner reported problems during the 1st 90 days of ownership. www.jdpower.com.

The Park

D-6871-2

Description: Ford Expedition/T-Bird JD Power Award Ad (Wall Street Journal Page 4/c)
JWT Job No.: FD-DIV-N22163
Park Job No.: FCAR-04714
Park Producer: T. Renshaw
Colors - CMYK
Live - na
Trim - 13.875" x 21.125"
Bleed - na
DPI@Full Size - 200 dpi
Photographer: Mediafin
Retoucher:
Park Project Mgr.: M. Trappa

Art Director: D. McCormick
Writer:
Designer: na
Account: L. Kelley / R. Ghiardi
Production: C. Soslin
Traffic: R. Jones / A. Gruebner
Art Admin: N. Fisher
Engraver: AdSend
Filed: Ford Div. / FCAR-04714 / D-69/1-2

Proof 2 05/04/02
Galley #1

Output size - 100%

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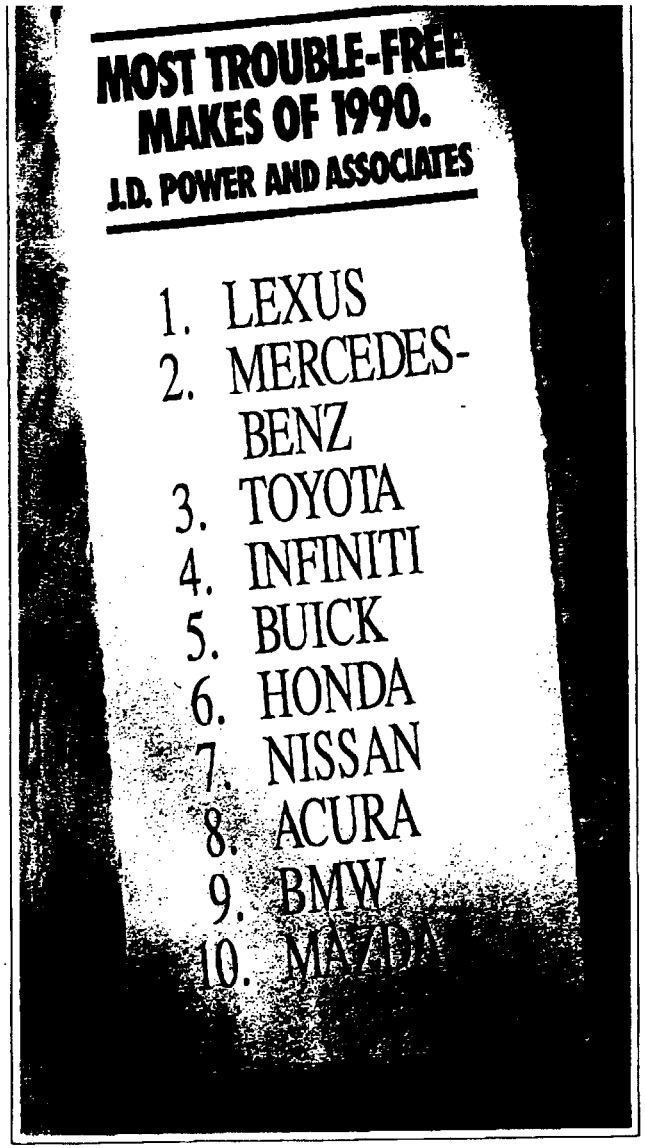
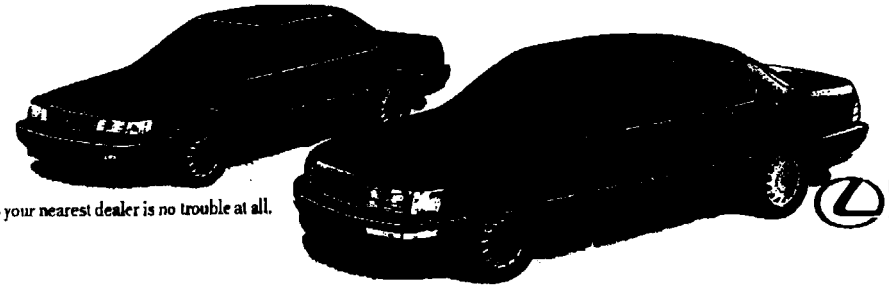


Just A Message For Those Who Won't Buy A New Car Until The Bugs Are Worked Out.



If by now you're more than a little intrigued by the Lexus LS 400 and ES 250, we have one further piece of good news. A visit to your nearest dealer is no trouble at all.

LEXUS
The Relentless Pursuit Of Perfection.

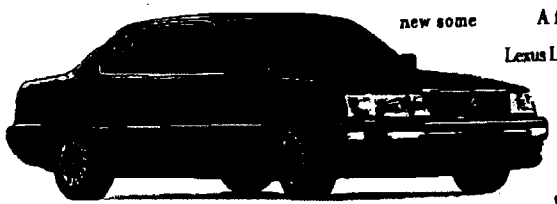
Recently, *Automobile Magazine* assembled five of the world's newest luxury sedans. For four days, the editors evaluated this high-performance quintet on such critical matters as ride, handling, comfort and value.

Their conclusion?

In six out of ten categories, the new Lexus LS 400 scored the highest rating.

And overall, Lexus finished in first place, a remarkable 26 points ahead of its closest competitor.

Not bad for a luxury automobile so new some people haven't yet heard of it.



THE LS400

The Lexus story, in brief: Six years ago, 1400 accomplished engineers were given the most challenging assignment of their careers—to relentlessly pursue automotive perfection.

Our First Report Card.

Everything learned during Toyota's fifty years of building cars was scrutinized and refined. Nothing less than the most advanced, the most ingenious, and the most exacting was judged worthy of Lexus.

Which explains why Lexus is now worthy of nothing less than *Automobile's* highest praise.

A few editorial comments on the Lexus LS 400 from the November issue:

"Extraordinarily swift, smooth and silent. Every member of the Lexus launch team should get a medal."

"The car contains all the hallmarks of a luxury sedan and combines them with state-of-the-art technology."

"The level of refinement in every area of performance is as good as that of any car sold in North America."

But perhaps the most gratifying words of all may be the magazine's final assessment:

"Lexus is a paragon."

Proving that what we've created is not simply a new model of car. But a new model of perfection.

For a reprint of *Automobile Magazine's* luxury sedan comparison and the name of the Lexus dealer near you, please call 800-USA-LEXUS.

Our first report card. If we had a refrigerator, we'd stick it on the door.

LEXUS

The Relentless Pursuit Of Perfection.

AUTOMOBILE

LUXURY CAR COMPARISON

	AUDI V8	BMW 735i	INFINITI Q45	LEXUS LS 400	MERCEDES 300E
Engine	3	7	11	10	3
Transmission	5	4	9	9	1
Ride	1	5	5	10	5
Handling	9	7	6	8	6
NVH (Quietness)	1	6	6	13	6
Exterior	4	9	4	7	4
Interior	3	7	5	7	5
Comfort	2	5	7	9	5
Enthusiast's Car	9	10	5	7	5
Best Value	3	4	5	9	3
TOTAL	40	64	63	90	43

Subjective scoring reprinted from Automobile Magazine, Nov. 1989. A total of 900 points was allocated among the editors and spent freely on each new fet.